UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

GUILFORD COLLEGE, *et al.* Plaintiffs, v. KEVIN K. MCALEENAN, in his official capacity as Acting Secretary of Homeland Security,[1] *et al.*, Defendants.	)	Civil Action No. 1:18-cv-0891

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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[1] On April 7, 2019, Kevin K. McAleenan assumed duties as the Acting Secretary of Homeland Security, automatically substituting for Defendant Kirstjen M. Nielsen, former Secretary, as a party in accordance with Federal Rule of Civil Procedure 25(d). Similarly, Kenneth T. Cuccinelli II assumed duties as Acting Director of U.S. Citizenship and Immigration Services on June 10, 2019 and is automatically substituted under the same Civil Rule.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

INTRODUCTION

Defendants respectfully submit this memorandum in support of their Motion for Summary Judgment (ECF No. 62) against Plaintiffs' First Amended Complaint (ECF No. 14) ("Complaint" or "Compl.") because Plaintiffs' claims are not justiciable and, even if they were, fail on the merits. The Plaintiffs' case is essentially a programmatic challenge for a permanent, nationwide injunction under the Administrative Procedure Act ("APA") against U.S. Citizenship and Immigration Services' ("USCIS") interpretation of when former F, J, or M nonimmigrant students begin to accrue unlawful presence. Specifically, USCIS's interpretation in an August 9, 2018 Policy Memorandum, PM-602-1060.1, "Accrual of Unlawful Presence and F, J, and M Nonimmigrants" (ECF No. 14-1) ("August PM").[2] *See* Certified Administrative Record ("CAR") at 6–18.

The Plaintiffs make four claims: (1) that the August PM is a legislative rule violative of the APA because it was issued without notice and comment, Compl. ¶¶ 185–92; (2) that the August PM is arbitrary and capricious, Compl. ¶¶ 193–201; (3) that the August PM is inconsistent with the Immigration and Nationality Act ("INA"), Compl. ¶¶ 202–11; and (4) that the August PM violates the Fifth Amendment's Due Process Clause, Compl. ¶¶ 212–21. But Plaintiffs have not shown how or when, if ever, any harm from the August PM might befall them. Defendants do not dispute that Plaintiffs' opposition to the August PM is genuine, but without any concrete or imminent injury, that opposition does not provide Article III jurisdiction. Moreover, the August PM is a reasonable interpretive rule exempt from the APA's notice-and-comment requirement, *see*

[2] The Complaint does not seek such relief against USCIS's May 10, 2018 memorandum eliciting public comment. (ECF No. 14-2.) Nor does the Complaint mention the May 10, 2018 memorandum. *See* Compl. at 36–42. The Court should decline to opine on this completely separate memorandum and dissolve that portion of its preliminary injunction. *See Hayes v. N. State Law Enforcement Officers Ass'n*, 10 F.3d 207, 217 (4th Cir. 1993)

S. Doc. No. 248, 79th Cong., 2d Sess. 18 (1946) (explaining the exemption), and consistent with both the INA and the Constitution once it is looked at within the context of a standard agency adjudication—which is not presented here. Without any specific facts or personal effects, this Court should grant summary judgment for Defendants and allow the debate to be held where it properly belongs: in the political branches.

BACKGROUND

Defendants incorporate by reference the "Legal Background" and "Factual And Procedural Background" sections in their Memorandum of Law in Support of Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint ("Motion to Dismiss"). *See* ECF No. 31 at 2–11 and 11–12, respectively.

STANDARD OF REVIEW

The APA provides for federal courts to review a final agency action. *See* 5 U.S.C. § 702. "[C]laims brought under the APA are adjudicated without a trial or discovery, on the basis of an existing administrative record[.]" *Audubon Naturalist Soc'y of the Cent. Atl. States, Inc. v. U.S. Dep't of Transp.*, 524 F .Supp. 2d 642, 660 (D. Md. 2007). Consequently, "review of the administrative record is primarily a legal question which is readily resolved by summary judgment." *Citizens for the Scenic Severn River Bridge, Inc. v. Skinner*, 802 F. Supp. 1325, 1332 (D. Md. 1991). Review under the APA is highly deferential and the agency action enjoys a presumption of validity and regularity. *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 192 (4th Cir. 2009). The party challenging an agency decision has the burden to demonstrate that the agency action was arbitrary or capricious. *N.C. Alliance for Transp. Reform, Inc. v. U.S. Dep't of Transp.*, 151 F. Supp. 2d 661, 679 (M.D.N.C. 2001). In assessing an agency action, "the

reviewing court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989) (quotations omitted). "Deference is due where the agency has examined the relevant data and provided an explanation of its decision that includes a rational connection between the facts found and the choice made." *Aracoma*, 556 F.3d at 192.

ARGUMENT

I. The Plaintiffs Lack Standing.

Defendants incorporate by reference "The Plaintiffs Lack Standing" subsection in their Motion to Dismiss. *See* ECF No. 31 at 13–19. Plaintiffs claim that an exception to the rules of standing should be made for them because of the possibility that a third-party, the U.S. Department of State, might at some point deny them or their members visas at U.S. Embassies or Consulates overseas and these actions would not be reviewable. *See* Compl. ¶¶ 133–34. But Plaintiffs have yet to make any concrete claim as to when, if ever, the State Department might even review any visa applications made by any of the Plaintiffs. That is fatal. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992) (requiring a "description of concrete plans, or … any specification of *when* the some day will be"); *Doe v. Obama*, 631 F.3d 157, 163 (4th Cir. 2011) (noting "*Lujan*'s requirement that plaintiffs have some concrete plan"); *see also Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 242 (1937) (requiring declaratory judgments to involve "an adjudication of present right upon established facts"). Without any concrete effects or established facts of when the Plaintiffs might be harmed, the Plaintiffs do not have standing, much less reviewable challenges under the APA. *See* 5 U.S.C. § 704 (judicial review limited to final agency action).

A. Standing to Make Programmatic Challenges

This Court preliminarily ruled that the individual Plaintiffs and the American Federation for Teachers ("AFT") had standing. *See* ECF 45 at 7–11. But the Court should reject that preliminary ruling because it was based on admitted contingencies that are entirely conjectural. *See id.* at 7 ("Ye and Li are likely to be subject to … [a] reentry bar *if* they are later adjudged to be out of status." (emphasis added)); *id.* at 10 (noting how the AFT's "declarant[s] fear[] that he or she would suffer harm under the new policy"). This is a problem because the Plaintiffs here are in no way challenging a discrete and final agency action.

Although procedural APA challenges may be brought "without meeting all the normal standards for redressability and immediacy," *Lujan*, 504 U.S. at 572 n.7, the Fourth Circuit has made it clear that a Plaintiff must still be able to point to some sort of effect for an Article III injury. *Doe*, 631 F.3d at 163 ("The imminence requirement is 'stretched beyond the breaking point when, as here, the plaintiff alleges only an injury at some indefinite future time, and the acts necessary to make the injury happen are at least partly within the plaintiff's own control.'"). In *Doe*, there was no standing where plaintiffs "did not allege that they ha[d] already tried and failed to adopt embryos, nor d[id] they allege any concrete plans for future adoption, so the possibility that they w[ould] never suffer the alleged injury loom[ed] too large." *Id.*.

The injury alleged by Plaintiffs is the possibility that a third party, the State Department,[3] might deny them or their members visas and these actions would not be reviewable, *see* Compl. ¶ 133. But Plaintiffs have still never claimed when (if ever):

[3] Under the INA, visas may be issued only by consular officers of the State Department (a third party). 8 U.S.C. §§ 1201, 1202, 1101(a)(9).

- they will apply for a visa or on what ground, *see* 8 U.S.C. §§ 1101(a)(15), 1153;
- they would be statutorily eligible to receive a visa but for the August PM, *see id.* § 1361; or
- the State Department might even review any of their visa applications.

Instead, the Plaintiffs can only claim the possibility that some injury *may* occur, and only upon a series of contingencies occurring. This speculation is fatal under *Doe* and *Lujan*.

In *Lujan*, the plaintiff challenged the Secretary of the Interior's entire "land withdrawal review program." 497 U.S. at 877–79. The program covered the Bureau of Land Management's ("BLM") activities in complying with the Federal Land Policy and Management Act of 1976 ("FLPMA"). *See id*. at 877. The Court found that the plaintiff's claim failed because it had not challenged a particular, final agency action. Instead of limiting its challenge to a "single BLM order or regulation, or even to a completed universe of particular BLM orders and regulations," the plaintiff challenged "the continuing (and thus constantly changing) operations of the BLM in reviewing withdrawal revocation applications and the classifications of public lands and developing land use plans as required by the FLPMA." *Id*. at 890.

Lujan thus prohibited programmatic agency challenges: "respondent cannot seek wholesale improvement of this program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made." *Id*. at 891. *Lujan*'s prohibition on programmatic challenges was motivated by institutional limits on Article III courts, which constrain judicial review to narrow, concrete, and actual controversies. *See id*. at 891–94; *see also Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) ("The limitation to discrete agency action precludes the kind of broad, programmatic attack we rejected

in *Lujan*[.]"). *Lujan* recognized that the "case-by-case approach" it required is "understandably frustrating" when "across-the-board protection" is sought by a plaintiff. 497 U.S. at 894. "But this is the traditional, and remains the normal, mode of operation of the courts." *Id*.

Following *Lujan*, the Fifth Circuit rejected a challenge to an agency's policy similar to the Plaintiffs' challenge in this case. In *Sierra Club v. Peterson*, 228 F.3d 559, 562 (5th Cir. 2000) (en banc), several environmental groups challenged the Forest Service's policy of allowing even-aged management techniques in the timbering of national forests. The groups cited several instances of allegedly improper timber sales based on the Forest Service's even-aged management policy. *Id*. at 563. They were not challenging any specific timber sales; they merely cited these sales as instances of the agency's challenged policy. *Id*. Nonetheless, the Fifth Circuit held that *Lujan* foreclosed this challenge, as the agency's policy of timber management to which the environmental groups objected did not constitute an identifiable agency action or event that affected the groups. *Id*. at 566. And unlike here—where there have been no cited agency actions or adjudications—the Fifth Circuit held further that the plaintiffs could not use the cited instances of alleged agency action as a basis to challenge a general policy: "Nor is this programmatic challenge made justiciable by the fact that the environmental groups identified some specific sales in their pleadings that they argue are final agency actions." *Id*. at 567. Although an agency's specific, final action may be challenged, "this ability does not allow [plaintiffs] to challenge an entire program by simply identifying specific allegedly-improper final agency actions within that program[.]" *Id*.

The Plaintiffs here seek to enjoin USCIS's guidance clarifying the calculation of unlawful presence for F, M, and J nonimmigrants, just as the *Sierra Club* groups had challenged the Forest

Service's timber sale policy. Neither the *Sierra Club* environmental groups nor the Plaintiffs in this case actually challenge a discrete agency action, but seek to enjoin an agency's general policy directive. Just as the Forest Service's general timber cutting policy did not constitute a discrete, final agency action, USCIS's change from one interpretive memorandum to another fails to rise to the level of a final agency action.

Plaintiffs are unable to overcome *Lujan*'s requirements by alleging that USCIS's policy somehow pre-determines the outcome of the agency's future adjudications of immigration petitions that may be filed at some point by some affected person. For example, in *RCM Technologies v. DHS*, 614 F. Supp. 2d 39 (D.D.C. 2009), the court held that the plaintiffs' challenge to a USCIS policy memorandum directing the use of a handbook to determine the minimum education requirements for a certain visa was not a justiciable case or controversy because the plaintiffs failed to challenge a final agency action. The court invoked *Lujan* for the proposition that the plaintiffs' challenge to a USCIS adjudication policy was not reviewable, and therefore plaintiffs failed to demonstrate a likelihood of success on the merits of their APA claims for purposes of preliminary injunctive relief. *Id*. at 45. To state a justiciable case or controversy for purposes of the APA, the plaintiffs were required to challenge a discrete agency action, not a general policy statement or memorandum. *Id*.

The August PM in this case is similar. A challenge to a policy, even as an alleged basis for another unfavorable adjudication (which, again, has not even been presented in this case), is not a justiciable claim, as the policy memorandum by itself does not rise to the level of a final agency action. *See PETA, Inc. v. U.S. Fish & Wildlife Serv.*, 130 F. Supp. 3d 999, 1002 (E.D. Va. 2015).

Since Plaintiffs here seek permanent injunction on a guidance document, their attack is a programmatic challenge, which does not implicate any "final" agency action.

B. The Individual Plaintiffs' Ongoing Agency Actions Defeat Jurisdiction.

As discussed, if a challenged agency action is not "final" under the APA, a court must dismiss the complaint for lack of subject matter jurisdiction. The "core question" is whether an action marks the completion of the "decisionmaking process, and whether the result of that process is one that will directly affect the parties." *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992). Thus, "[w]here relief is available from an administrative agency, the plaintiff is ordinarily required to pursue that avenue of redress before proceeding to the courts, and until that recourse is exhausted, suit is premature and must be dismissed." *Reiter v. Cooper*, 507 U.S. 258, 269 (1993); *accord Massieu v. Reno*, 91 F.3d 416, 421 (3d Cir. 1996) (Alito, J.). Anything less is contrary to the APA's statutory framework and would allow Plaintiffs to raise their claims in district court to effectively "bypass the administrative process" and undermine Congress' intent to streamline judicial review and conserve judicial resources. *Kurfees v. INS*, 275 F.3d 332, 336 (4th Cir. 2001).

This requirement bars the individual Plaintiffs' suit because, as previously noted, several events must take place before *anyone* involved in this litigation will be subject to an inadmissibility determination from any unlawful-presence bar to reentry. Former students who may be affected by the August PM will not become inadmissible based on the accrual of unlawful presence until they accrue more than 180 days of unlawful presence, depart the United States, and then seek admission or a visa within three or ten years. 8 U.S.C. § 1182(a)(9)(B). For those not departing the country, the unlawful-presence calculation will only affect them if an agency makes such an inadmissibility determination; and if the Department of Homeland Security ("DHS") uses its

prosecutorial discretion to place anyone in removal proceedings; and if an immigration judge ("IJ") determines that he must be removed. *See* 8 U.S.C. § 1229a (IJ determinations); 8 C.F.R. § 1003.1(b) (Board of Immigration Appeals); 8 U.S.C. § 1252(a)(5), (b)(9) (petitions for review before courts of appeals).

Moreover, the Army still has not rendered military-service suitability determinations to decide whether the individual Plaintiffs will be permitted to serve, thereby potentially becoming eligible for military naturalization under 8 U.S.C. § 1440 such that the unlawful presence bar will *never* apply to them. *See* ECF Nos. 16-1, 16-2. Where there are ongoing administrative processes that may entirely moot the underlying APA challenge, courts lack jurisdiction under the APA. *See, e.g.*, *Qureshi v. Holder*, 663 F.3d 778, 780–81 (5th Cir. 2011) (no final agency action for something it is "only an intermediate step in a multi-stage administrative process"); *Cabaccang v. USCIS*, 627 F.3d 1313, 1317 (9th Cir. 2010) (same); *see also Dhakal v. Sessions*, 895 F.3d 532, 540 & n.10 (7th Cir. 2018); *Jama v. DHS*, 760 F.3d 490, 496 (6th Cir. 2014). With parallel administrative processes still underway, this Court is without jurisdiction under the APA. *See Canal A Media Holding, LLC v. USCIS*, — F. Supp. 3d —, 2019 WL 1390983, at *5 (S.D. Fla. Mar. 27, 2019) ("If an initial agency action may be modified or reversed during administrative review, the decision is necessarily non-final for purposes of judicial review[.]").

II. The Plaintiffs' Claims Against The August PM Fail On The Merits.

A. The August PM is an Interpretive Rule Exempt From Notice and Comment

Turning to the merits, even if the Plaintiffs had standing and there were some "final agency action" they could point to, the Plaintiffs' claims should still fail on the merits. Plaintiffs first claim that the August PM violated the APA because it was not issued with notice-and-comment. Compl.

¶¶ 185–92. This Court's preliminary injunction disagreed with that argument by pointing to how USCIS's August PM was explicitly "*changing its policy* on how to calculate unlawful presence," ECF No. 45 (emphasis in original), but never confronted how "[t]here is nothing necessarily wrong with this sort of seesaw," *North Carolina Growers' Association v. United Farm Workers*, 702 F.3d 755, 772 (4th Cir. 2012) (Wilkinson, J., concurring), or how "general statements of policy" are also exempted from the notice-and-comment requirement, 5 U.S.C. § 553(b)(A).

The APA requires agencies to follow notice-and-comment procedures for legislative rules, but it makes a "categorical" exemption for interpretive rules. *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1206 (2015) (overruling the D.C. Circuit's approach, finding that an interpretive rule is categorically exempt from the notice-and-comment requirements, even if it amends the agency's previously announced interpretation); *see also* 5 U.S.C. § 553(b)(A). The "critical feature of interpretative rules is that they are issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." *Mortg. Bankers*, 135 S. Ct. at 1204 (quotations omitted). Interpretive rules "merely explain[] or clarify[y] existing law[.]" *Allen v. Bergland*, 661 F.2d 1001, 1007 (4th Cir. 1981). A rule is "legislative" if it "adopt[s] a new position inconsistent with any of the Secretary's existing regulations," and thus "effec[ts] a substantive change in the regulations." *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 100 (1995). A rule is not legislative "simply because an agency 'supplies crisper and more detailed lines than the authority being interpreted.'" *Iowa League of Cities v. EPA*, 711 F.3d 844, 873 (8th Cir. 2013) (quoting *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2 1106, 1112 (D.C. Cir. 1993)). Legislative rules have the force and effect of law; interpretive rules do not. *Mortg. Bankers*, 135 S. Ct. at 1204.

In *Guernsey*, the Supreme Court held that an agency guideline in a provider-reimbursement manual was a valid interpretive rule. 514 U.S. at 90. The hospital argued that the guideline, which required the hospital to amortize its refinancing loss, was a legislative rule because it substantively changed the Secretary's regulations. *Id.* at 91. After reviewing the Secretary's "comprehensive and intricate" regulations, which "address[ed] a wide range of reimbursement questions," *id.* at 96, the Supreme Court concluded that "[t]he only question unaddressed by the otherwise comprehensive regulations on this particular subject is whether the loss should be recognized at once or spread over a period of years," *id.* at 97. The guideline answered this "unaddressed" question by applying statutory and regulatory requirements to "this particular subject." *Id.*; *see also id.* at 98–99. The Court thus concluded that the guideline "is a prototypical example of an interpretive rule 'issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers.'" *Id.* at 99 (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 n.31 (1979) (citation omitted)). Because the guideline did not "adopt [] a new position inconsistent with ... the Secretary's existing regulations," the Supreme Court explained, it "d[id] not ... effect a substantive change in the regulations" and thus did not require notice and comment. *Id.* at 100 (quotation marks and alteration omitted).

Here too, the August PM is an interpretative rule because it answers a "question unaddressed" by existing statute or regulation, and "advise[s] the public" regarding how to apply a regulatory formula in a particular situation. 514 U.S. at 97, 99. It is true that the USCIS "May 2009 Policy Memorandum, Compl. ¶ 4, CAR 32–82 ("May 2009 PM"), answered and advised the public in a different way, but that does not transform what has *always* been understood to be an interpretive rule, *see United States v. Atandi*, 376 F.3d 1186, 1190 n.7 & 8 (10th Cir. 2004)

("internal interpretive guidelines"), into a legislative rule under the APA. The August PM, as described in the document itself, does not "effect a substantive change in the regulations." *Guernsey*, 514 U.S. at 100 (alteration omitted). Rather, it clarifies how time in unlawful status will begin counting as unlawful presence once a former student has, for example, stopped or finished a course of study and failed to maintain the status afforded them when admitted. This issue is currently unaddressed in either the INA or in its implementing regulations. Therefore, the August PM is merely providing internal guidance on an unaddressed question.

The August PM begins with an explanation of why USCIS is revisiting the May 2009 PM. CAR 6–7. It explains how agency databases tracking visiting foreign-national students have improved dramatically since the former-Immigration and Naturalization Service ("INS") settled on the earlier interpretation of starting the unlawful-presence clock with a formal USCIS adjudication finding a failure to maintain status or IJ finding. *Id.* It then explains how recent statistics bear out that the visa-overstay rate for former F, J, or M visa holders is "significantly higher than those for other nonimmigrant categories" and announces that, in light of these more recently acquired facts and advancements in the government's technology, immigration officers also should begin counting time when a former student is no longer pursuing a course of study. *Id.* at 7 & n.5.

That determination does not supplement or effect a change to the statutory or regulatory scheme applicable to foreign students any more than the May 2009 PM. Instead, the August PM communicates to those students the agency's view of when the language of an existing statute will begin applying to a particular problem of visa overstays. That is a "quintessential interpretive rule." *Flytenow, Inc. v. FAA*, 808 F.3d 882, 889 (D.C. Cir. 2016). Indeed, the August PM does not alter,

add, or remove any regulatory or statutory provisions. The same behavior that triggered unlawful presence before the August PM's publication—a violation or failure to maintain status—continues to trigger unlawful presence. No new behavior, either by action or inaction, will trigger accrual of unlawful presence under the August PM. Rather, the guidance relates *only* to officers calculating the amount of unlawful presence accrued by a foreign national as a consequence of that (in)action. In other words, the accrual will begin at the time the alien fails to maintain status, rather than at the time that the violation is recognized.

That the August PM announced a new position—and, in so doing, allegedly caused fear to some of the Plaintiffs—does not render it a legislative rule. It is beyond dispute that agencies are free to adopt a position that reverses or substantially deviates from an earlier one. *See Perez*, 135 S. Ct. at 1207. Such a change does not subject the agency's action to the APA's notice-and-comment requirements. "Because an agency is not required to use notice-and-comment procedures to issue an initial interpretive rule, it is also not required to use those procedures when it amends or repeals that interpretive rule." *Id.* at 1206. Here, there can be little doubt that the May 2009 PM was an interpretive rule and thus properly issued without notice and comment, *see Flytenow*, 808 F.3d at 889. This is apparent given that the interpretation Plaintiffs insist upon was itself the product of another interpretive memo never subjected to notice and comment. As the Fourth Circuit has held, this past agency behavior is "highly relevant" to the interpretive- or legislative-rule analysis. *See, e.g.*, *N.C. Growers' Ass'n*, 702 F.3d at 765; *see also Nat'l Council for Adoption v. Jewell*, 156 F. Supp. 3d 727, 737 (E.D. Va. 2015) (finding that agency's conduct in *not* initiating notice and comment for challenged guidelines "tends to demonstrate that the 2015 Guidelines are non-binding interpretative rules"). The decision to amend that earlier guidance did not change the

fundamental character of the agency's action and transform an interpretive rule into a legislative one.

This Court's preliminary injunction and the Plaintiffs have described the August PM as "policy material … in the USCIS Adjudicator's Field Manual … binding … adjudicators," ECF No. 45 at 17, but that the Field Manual's directive that policy material is "binding" must be understood in the context of the three types of "policy" contained in the Field Manual, none of which are binding for purposes of creating a legislative norm subject to the requirements of notice and comment rulemaking. First, the Manual contains procedural directives intended for the orderly internal management of the agency and its processes, without conferring important procedural benefits on the regulated public. *See, e.g., USCIS Adjudicator's Field Manual* § 10 (outlining standard operating procedures for the adjudication process, including receiving, receipting and ordering cases). These procedural rules are managerial directives to agency personnel for the purpose of achieving an orderly method of transacting business. Although USCIS expects that agency personnel will follow these procedural rules, they are not legally enforceable against the agency. *See Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 538–39 (1970). Such procedural rules are also exempt from notice and comment rulemaking, even if they alter the manner in which the regulated public presents itself or its viewpoints to the agency. *See JEM Broadcasting Co., Inc. v. FCC*, 22 F.3d 320, 326–27 (D.C. Cir. 1994); 5 U.S.C. § 553(b)(A) (exempting general statements of policy from notice-and-comment procedures).

Second, the Manual contains guidelines that the agency expects adjudicators to reference when evaluating evidence proffered by petitioners and applicants seeking immigration benefits. These guidelines are not binding on the agency in a legal sense, because they leave a substantial

degree of discretion to the adjudicators in determining whether a petitioner's job meets a legal standard. *See RCM Tech.*, 614 F. Supp. 2d at 46. These types of "policy" directives cannot constitute a final agency action for purposes of APA review, since they do not constrain agency discretion. *Id*. (see above). It is within this second category that the August PM is properly understood, since the guidance directs adjudicators to consider a number of flexible factors when determining whether or how much "unlawful presence" a former F, J, or M nonimmigrant has accrued.

Third, the Manual contains the agency's legal interpretations, including interpretations of ambiguous provisions in the agency's organic statute. These interpretations are "binding" on agency personnel in a legal sense, although not by virtue of their promulgation in the Field Manual, but because of the binding nature of the interpreted statute. *See Dismas Charities, Inc. v. DOJ*, 401 F.3d 666, 681 (6th Cir. 2005) ("An interpretative regulation is binding on an *agency* … not by virtue of the promulgation of the regulation (as in the case of a legislative regulation), but by virtue of the binding nature of the interpreted statute. Such a binding nature cannot render a rule legislative, else every interpretative rule would become legislative."); *see* 6 U.S.C. § 271(a)(3)(A), (D) (endowing the USCIS Director—who signed the August PM—with the authority to establish the agency's policies). Nevertheless, these legal interpretations are exempt from notice and comment rulemaking, even if they have a substantial impact on the regulated public. *Id*. ("An interpretative regulation is binding on an *agency* … not by virtue of the promulgation of the regulation (as in the case of a legislative regulation), but by virtue of the binding nature of the interpreted statute. Such a binding nature cannot render a rule legislative, else every interpretative rule would become legislative."). Additionally, the Field Manual contains the agency's

interpretations of its own ambiguous regulations. Simply providing crisper and more detailed lines than the authority being interpreted does not transform the interpretation into a legislative rule. *See Am. Mining*, 995 F.2d at 1112. In this third context, when the Field Manual states that policy material is "binding," this is true under *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) and its progeny, since the interpretations elaborate upon existing legislative rules, but that does not transform these interpretive statements into legislative rules for purposes of notice-and-comment rulemaking. *See Am. Mining*, 995 F.2d at 1110. USCIS's "clarification" in a guidance document does not rise to the level of a binding legal norm.

B. The August PM is Neither Arbitrary, Capricious, nor Ultra Vires

Similarly, the August PM is far from arbitrary or capricious when the agency charged with administering the INA is concerned with visa overstays and reasonably believes that F, J, and M nonimmigrants contribute to that legitimate problem. CAR 1–5; 7; 107–206. Moreover, since the September 11, 2001 terrorist attacks, government databases are now far more precise at monitoring when an F, J, or M nonimmigrant student is no longer an *actual* student or attending classes and have established that the visa overstay rate for such students is higher than those of other nonimmigrant categories. *See* CAR 7 n.5. This improved monitoring capability coupled with the increasing overstay rate prompted the agency action and provides the "rational" explanation sufficient for arbitrary-and-capricious review. *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

USCIS's interpretation is also fully consistent with the INA's text because there is nothing whatsoever in the relevant inadmissibility provisions, 8 U.S.C. §§ 1182(a)(9)(B) or (C), to suggest that the government is *required* to tell a former foreign-national student that he has graduated or

finished his classes; in fact, the INS initially interpreted the INA and the 1996 enactment of the disputed language in a manner *consistent* with the August PM. *See Atandi*, 376 F.3d at 1190 nn.7 & 8 (noting how a previous interpretive "September 1997 INS memorandum marked a change in course for the agency, *which had previously taken the position that unlawful presence began to accrue under this statute upon a status violation*" (emphasis added)). Further, in the late 1990s and early 2000s—that is, *well after* the inadmissibility provisions at issue were enacted—Congress statutorily affirmed that the Executive branch must carefully scrutinize F, J, and M nonimmigrants, by imposing visa requirements particular to those visa classifications. *See* 8 U.S.C. §§ 1761(b) (data collection from aliens), 1762 (compliance reviews), 1372 (data collection from educational organizations); *see also id.* § 1623(a) (in a 1996 law, limiting aliens without legal presence's ability to qualify for postsecondary education benefits). The August PM reflects these congressional prerogatives, which Plaintiffs ignore.

USCIS's position is also inherently reasonable. USCIS reasonably concluded that it does not take a formal notice letter by the agency or an immigration judge to inform a former F, J, or M student that he or she violated status by engaging in unauthorized activity. It is not arbitrary for the agency to choose an interpretation of when "unlawful presence" begins that is more accurate and hews closer to reality. Nor does it go against the INA's language that unlawful presence encompasses unlawful status. Compl. ¶¶ 206–11. This is because unlawful status is but a component in the analysis undertaken by adjudicators in assessing whether a former student has accrued unlawful presence. *See Chaudhry v. Holder*, 705 F.3d 289, 292 (7th Cir. 2013); *In re L-K-*, 23 I. & N. Dec. 677, 680–81 (BIA 2004) (distinguishing status and presence). And just because the unlawful-presence analysis considers unlawful status does not mean USCIS has improperly

conflated those separate, but related, terms. Indeed, many foreign nationals in the United States, including those who enter without inspection or are paroled into the United States under 8 U.S.C. 1182(d)(5), have no immigration status at all, but may still accrue unlawful presence. Similarly, that an F, J or M nonimmigrant no longer is pursuing a course of study or has otherwise violated status does not necessarily equate with accrual of unlawful presence, as such accrual may toll for any variety of reasons, including if the they file an application for adjustment of status to lawful permanent residence. Thus, the relevant inquiry is whether a guidance document might fairly treat them similarly under each individual's case by looking at when someone either lost his or her student status, or might otherwise fall within an exception to accruing unlawful presence. *Cf. United States v. Igbatayo*, 764 F.2d 1039, 1040 (5th Cir. 1985) (per curiam) ("After failing to maintain the student status required by his visa, Igbatayo was without authorization to remain in this country. He thus was in the same position legally as the alien who wades across the Rio Grande or otherwise enters the United States without permission.").

The Plaintiffs' claims on this score ultimately boil down to how the August PM is inconsistent with past practice and that USCIS did not consider reliance interests. Compl. ¶¶ 197–200. But reliance interests were considered in that the August PM does not apply in many respects to violations before the memorandum's issuance. It is also curious as to what reliance interests someone might have in being able to violate their nonimmigrant status. Regardless, it is not required for an agency to be explicit of all of the considered interests when a central purpose of interpretive rules is to advise the public—a key distinction from legislative rules. *See Chen Zhou Chai v. Carroll*, 48 F.3d 1331, 1341 (4th Cir. 1995) ("We also reject Chen's argument that the January 29, 1990 interim rule was invalidly revoked because the Attorney General offered no

'reasoned explanation' for the change in policy. … [T]his requirement applies only to revocations of substantive rules, not to revocations of interpretive rules or general statements of policy."), *superseded on other grounds by statute*, 8 U.S.C. § 1101(a)(42)(B), *as recognized in Li v. Gonzales*, 405 F.3d 171, 176 (4th Cir. 2005).

The August PM and the record make it plain that USCIS was far from arbitrary in deciding to interpret 8 U.S.C. §§ 1182(a)(9)(B) & (C)'s operative text of "present in the United States after the expiration of the period of stay authorized" to actually mean that period of time in reality, rather than in bureaucracy. Plaintiffs raising reliance on the May 2009 PM amounts to an argument that a student would not have remained unlawfully in the United States if he had known the unlawful presence would begin to run the day after he fell out of lawful status. In other words, he would not have violated the immigration laws of the United States if he had known he would have been held accountable for all of his unlawful presence, not just the unlawful presence accrued after USCIS or an IJ memorialized his unlawful presence in writing.

C. *The August PM is Constitutional and the Plaintiffs Do Not Merit a Permanent Injunction Under* Salerno

Plaintiffs' due-process claim must also fail. When making a facial challenge to a regulatory policy such as that at issue here, "the challenger must establish that *no set of circumstances exists under* which the [policy] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). Here, numerous cases in the criminal context—where the issue of proper notice is at its zenith—have long been in accord that a former foreign-national student may be sufficiently on notice as to when, in reality, he or she stopped attending classes. *See, e.g.*, *United States v. Bazargan*, 992 F.2d 844, 847–48 (8th Cir. 1993); *Igbatayo*, 764 F.2d at 1040. Due process only requires "the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge,*

424 U.S. 319, 333 (1976) (quotation omitted). And agencies are not necessarily required to provide trial-like procedures unless mandated to do so by Congress. 5 U.S.C. § 554(a); *see also Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 655–56 (1990).

Having some set of facts is crucial on this score because of Plaintiffs' high *Salerno* burden: the need to demonstrate that "*no set of circumstances exists under* which the [policy] would be valid." *Salerno*, 481 U.S. at 745 (emphasis added). That is far from certain here, as there are numerous circumstances where a former F, J, or M nonimmigrant would be well-aware of when he or she stopped attending classes. Nothing in the record suggests when or how any of the Plaintiffs might not be on notice as to when they last attended classes, or that they were in any way confused by when their F, J, or M nonimmigrant status might have expired. Plaintiffs have failed their burden on this count. Moreover, if DHS determines that a student has accrued unlawful presence, he will have an opportunity to be heard and submit evidence to establish whether or when he began to accrue unlawful presence, both during and beyond the adjudication process through motions and appeals.

CONCLUSION

Based on the foregoing, Defendants respectfully submit that this Court should grant summary judgment in their favor.

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CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2019, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will provide electronic notice and an electronic link to this document to all attorneys of record.

DATED: July 22, 2019

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CERTIFICATE OF WORD COUNT

Pursuant to Local Rule 7.3(d), I hereby certify that this filing contains 6,234 words, excluding all parts of the brief exempted by that same rule.

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